FREEDOM OF EXPRESSION: THE MASS DEMONSTRATION UNDER THE FIRST AMENDMENT

I. INTRODUCTION

The mass demonstration has frequently been a means for the expression of minority opinion.[1] In the United States, its use has been especially prevalent during the last decade. The emerging civil rights movement has used the demonstration to communicate the inadequate development of racial equality in the United States. Such demonstrations as sit-ins, crusade-type marches, all-night vigils, and picketing, are commonly associated with the civil rights movement. Since the United States involvement in Vietnam has become an internal crisis in the American political arena, peace demonstrations have taken a portion of the "spotlight" from civil rights demonstrations,[2] although the two are sometimes interrelated.[3] From speeches by "peace-niks"[4] and public draft card burnings,[5] to massive marches on Washington, demonstrations of dissent on the Vietnam issue have captured a great deal of attention. The purpose of this paper is to analyze the mass demonstration as a mode of political expression,[6] assess the constitutional basis of the demonstration, recognize the permissible restrictions,[7] and generally, communicate the desirability and necessity of the mass demonstration as a means of petitioning the government.

II. THE RIGHT TO A PUBLIC FORUM.

A. *Development of a Hierarchy of First Amendment Rights*

Probably the first Supreme Court discussion of the right to a public forum occurred in 1897 with its decision in *Davis v. Massachusetts*.[8] A Baptist minister was preaching the gospel in the Boston Common without first obtaining a permit from the mayor, as required by statute. His subsequent conviction finally reached the United States Supreme Court. However, the Court's decision favored the power of the state to pass such provisions:

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[1] *See* A. ETZIONI, DEMONSTRATION DEMOCRACY (1968).

[2] *See* FINMAN and MACAULAY, *Freedom to Dissent: The Vietnam Protests and the World of Public Officials*, 1966 WIS. L. REV. 632.

[3] Statement by Martin Luther King, Jr. that the war in Vietnam must be stopped to secure internal order. N. Y. Times, July 3, 1965, p. 6, col. 2.

[4] *See* the poems of Allen Ginsberg.

[5] Some of the first reported draft card burnings were in 1965. N. Y. Times, Oct. 19, 1965, p. 5 cols. 1, 4.

[6] *See* Note, *Freedom of Speech and Assembly in Streets and other Public Places*, 19 GEO. WASH. L. REV. 637 (1951).

[7] *See* Comment, *Limitations on the Right of Assembly*, 23 CALIF. L. REV. 180 (1935).

[8] 167 U. S. 43 (1897).

> When no proprietary rights interfere, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes.[9]

At this first instance the right to a public forum did not receive favored treatment. However, in *Hague v. Committee for Industrial Organization*,[10] the Supreme Court indicated that public streets and public places could be used by citizens for communication of views on national questions.[11] This privilege of citizenship, however, was deemed to be a relative one and only exerciseable in "subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."[12] The Court's holding seems to be a somewhat awkward endorsement of the "privilege" to use public places for communicating views on national questions. It would appear that regulation would necessarily abridge, if not deny, this privilege. However, it is generally felt that the *Hague* decision stands for the proposition that the public does have a basic constitutional right to use the streets, parks and public places in the exercise of first amendment rights.[13]

Even in the public arena, certain types of expression are not protected.[14] One such type includes words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[15] However, even this "fighting words" concept has been subject to limitation. In *Terminiello v. City of Chicago*,[16] Mr. Justice Douglas, for the majority, noted that

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.[17]

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[9] The Supreme Court agreed with the opinion of then Judge Holmes, printed at 162 Mass. at 510, 39 N. E. at 113.

[10] 307 U. S. 496 (1939).

[11] Jamison v. Texas, 318 U. S. 413 (1943), made it clear that the implication to the contrary in *Davis* was overruled.

[12] 307 U. S. at 515-516.

[13] *See*, e.g., Cox v. New Hampshire, 312 U. S. 569 (1941); Kunz v. New York, 340 U. S. 290 (1951); Edwards v. South Carolina, 372 U. S. 229 (1963); I T. EMERSON, D. HABER, N. DORSEN, Political and Civil Rights in the United States 426 n. 1 (1967).

[14] Generally these types are the following: "lewd and obscene," Roth v. United States, 354 U. S. 476, 484 (1957); "defamatory," Beauharnais v. Illinois, 343 U. S. 250, 266 (1952); and "fighting words," Chaplinsky v. New Hampshire, 315 U. S. 568 (1942).

The Supreme Court has established a high priority for political speech among first amendment rights. This high priority was adequately expressed in *New York Times v. Sullivan*, 376 U. S. 254, where speech that was libelous—and unprotected—was nonetheless protected if the expressions were on major public issues.

[15] Chaplinsky v. New Hampshire, 315 U. S. 568, 572 (1942); *see* CHAFEE, FREE SPEECH IN THE UNITED STATES 149 (1941).

[16] 337 U. S. 1 (1949).

[17] *Id.* at 4.

It is submitted that this function of free speech, recognized by the Court in *Terminiello*, is peculiarly characteristic of petitioning speech. A petition for redress often is meant to "induce unrest," "create dissatisfaction," and "stir people to anger." The established purpose of the petitioning is to induce a change of position—a redress of present grievances. Any form of petitioning would appear to represent a part of this provocative function of free speech.

Justice Douglas went on to state that even though freedom of speech is not absolute "[i]t is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . ."[18] It appears that petitioning is, by its very nature, a form of free speech which necessarily invites dispute. The question then becomes, whether the acknowledged value in being permitted to petition the government, outweighs the substantive evil that the dispute it invites, may turn out to be a violent one.

In *Feiner v. New York*,[19] the Supreme Court dealt with the conflict between the criminal offense of disorderly conduct and the first amendment freedom of expression. The case involved a speech given on a street corner to a crowd of about seventy-five or eighty people, both Negro and white. After one person in the crowd threatened violence, two policemen demanded that the speaker stop his speech due to the propensity of violence. The speaker refused and was arrested for disorderly conduct. Chief Justice Vinson delivered the majority opinion upholding the conviction. He stated that it was necessary to determine whether a clear and present danger of disorder was threatened. This statement brings to mind the test applied in *Terminiello*, where the court stated that freedom of speech is protected "unless shown likely to produce a clear and present danger of a *serious* substantive evil that rises *far above* public inconvenience, annoyance, or unrest. . . ."[20] (emphasis supplied). It appears questionable whether Feiner's speech, which indeed may have threatened some "disorder," was enough to threaten a "serious substantive evil." In fact, it is more likely that if the individual threatening violence caused a disorder, it was more closely akin to the "public inconvenience, annoyance, or unrest" classification. However, the Supreme Court, noting its respect for the community interest in maintaining peace and order on its streets, stated that the conviction did not encroach upon Feiner's constitutional rights. The Court then expressed what appears to be its test:

> When as here the speaker passes the bounds of argument or persuasion

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[18] *Id.*

[19] 340 U. S. 315 (1951).

[20] Note 16 *supra.*

> and undertakes incitement to riot, they (the police) are powerless to prevent a breach of the peace.[21]

Justice Black, dissenting, read the facts differently, i.e., violence did not appear to be as imminent. However, Justice Black went further and added:

> Moreover, assuming that the 'facts' did indicate a critical situation, I reject the implication of the court's opinion that the police had no obligation to protect petitioner's constitutional right to talk. The police of course have power to prevent breaches of the peace. But if, in the name of preserving order, they can interfere even with a lawful public speaker, they first must make all reasonable efforts to protect him.[22]

Black's dissent in *Feiner* indicates his high regard for freedom of speech. However, his view in later cases, where the expression is not made in the form of pure speech is quite different.

In *Edwards v. South Carolina*,[23] two hundred Negro students walked single file and two abreast through the grounds of the State Capital in Columbia, South Carolina, protesting segregation. After thirty to forty-five minutes of demonstrating, the police told the marchers to disperse. After refusing, petitioners were arrested and convicted for breach of the peace. The convictions were set aside. Mr. Justice Stewart, for the majority, stated: "The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form."[24] He then described the right to peaceably assemble and petition the government for a redress of grievances. The emphasis, as usual, was primarily upon whether or not there was violence. Since there was no violence, Justice Stewart looked to *Terminiello* and quoted: "The Fourteenth Amendment does not permit a state to make criminal the peaceful expression of unpopular views. . . ."[25] The peaceful demonstration was recognized as an acceptable petitioning for a redress of grievances within the first amendment.

Cox v. Louisiana[26] involved another civil rights demonstration. This one was before the courthouse in downtown Baton Rouge, Louisiana. The demonstrators were convicted for breach of the peace. The police had decided to arrest them when indications were that the demonstrators at the courthouse also were to picket lunch counters. On the basis of *Edwards v. South Carolina*, Justice Goldberg, for the Court, stated that it was clear that the conviction infringed Cox's rights of free speech and

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21 340 U. S. at 321.
22 *Id.* at 326.
23 372 U. S. 229 (1963).
24 *Id.* at 235.
25 *Id.* at 237.
26 379 U. S. 536 (1965).

free assembly.[27] He further noted that "[m]aintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy."[28]

In a concurrence, Justice Black explicitly set out his distinction between the regulation of conduct—patrolling and marching—and speech. He stated that regulating conduct

> . . . would be constitutional, subject only to the condition that if such a law had the effect of indirectly impinging on freedom of speech, press, or religion, it would be unconstitutional if under the circumstances it appeared that the State's interest in suppressing the conduct was not sufficient to outweigh the individual's interest in engaging in conduct closely involving his First Amendment freedoms.[29]

To say the least, this is a confusing statement. Justice Black seems to say that conduct—as distinguished from pure speech—may be constitutionally regulated but if (1) the law indirectly impinged the freedom of speech, press or religion, *and* (2) it appeared that the State's interest in suppression did not outweigh the individual's first amendment interest, the law would be unconstitutional. Black appears to be placing symbolic speech—notice he omits the right to peaceably assemble and petition the government for a redress of grievances—in just the opposite position of pure speech. He seems to lower the hierarchal preference when the expression is other than verbal. Black goes on to state:

> The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press and assembly *where people have a right to be for such purposes*.[30]

Black, who is a so called absolutionist, appears to be, "writing in" limitations on first amendment freedoms. He makes an absolute statement—"take away. . . .all power to restrict"—and then he adds, with emphasis, the phrase "*where people have a right to be for such purposes.*" It seems unlikely that his statement is internally consistent. It would appear that the mere determination of where people have a right to be may itself be a rather monumental restriction on first amendment rights. No such requirement is apparent from reading the first amendment.[31]

The emphasis above upon the confusing reasoning of Justice Black is due to the more recent case in the demonstration area of *Adderly v. Florida*.[32] Petitioners, Harriett Louise Adderly and thirty-one other persons, were convicted by a jury on a charge of "trespass with a malicious

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[27] *Id.*

[28] *Id.* at 574.

[29] *Id.* at 577.

[30] *Id.* at 578.

[31] U. S. CONST. amend. I.

[32] 385 U. S. 39 (1966).

and mischievous intent" upon the premises of the county jail contrary to a Florida statute. Justice Black delivered the opinion.

In distinguishing *Edwards v. South Carolina*,[33] Black placed some emphasis upon the fact that *Adderly* involved a jail and *Edwards* involved the state capital.[34] His distinction was as to traditional use or purpose: "capital grounds are open to the public. Jails, built for security purposes, are not." Black, then, distinguished the modes of entrance to the public grounds—in *Edwards*, the demonstrators "went through a public driveway," while in *Adderly*, they "entered the jail grounds through a driveway used only for jail purposes and without warning to or permission from the sheriff."[35] "More importantly," Justice Black distinguished the particular sanctions used in the two factual situations. In *Edwards*, South Carolina had prosecuted the demonstrators with the common law crime of breach of the peace. In *Adderly*, Florida used a trespass statute which Black deemed not to be as "indefinite, loose, and broad" as the breach of the peace charge. Thus, the Florida statute was not challengeable on grounds of vagueness. Of course, an assessment of whether the statute was unconstitutionally vague, is not the only way that the conviction could be held to deny the petitioners their first amendment rights. Therefore, Black discussed the application of the statute by the sheriff and described it as "even-handed enforcement."[36] He then stated,

> The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate. . . . Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, Cox v. Louisiana, Supra, at 554-555 and 563-564. We reject it again.[37]

It seems that *Adderly* is indeed an endorsement of state "governmental power to restrict freedom of speech, . . . and assembly."[38] Since the trespass statute sanctioned conduct rather than pure speech, perhaps Jus-

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[33] Note 23 *supra.*

[34] This point is connected to his idea of freedom "where people have a right to be for such purposes."

[35] 385 U. S. at 41. Justice Black is apparently distinguishing the cases on the distinction of "unrestricted public use" versus "limited public use."

[36] 385 U. S. at 47. This seems to leave an implication that if the statute is not unconstitutionally vague on its face, then the only question is whether or not it is administered discriminatorily. This sounds more like an equal protection analysis than a first amendment one.

[37] 385 U. S. at 47-48.

[38] 379 U. S. at 577.

tice Black's test for constitutionally regulating conduct could have been used.[39] Conduct may be constitutionally regulated but if the law indirectly impinges first amendment rights and the state's interest in suppression does not outweigh the first amendment interest, the law is unconstitutional.[40] The proscribed conduct in *Adderly* was "malicious trespass" —petitioners remaining on jail grounds after the sheriff demanded them to leave. Is there any question that this law at least, indirectly impinged the petitioners' first amendment right of peaceable assembly? It appears clear that this law *directly* restricted petitioners rights. However, this would not be sufficient under Justice Black's test. It also must appear that the State's interest in suppression does not outweigh the first amendment interest. How is one to balance these interests? Justice Black's statement that there is not a constitutional right to propagandize protests "whenever," "however," and "wherever," is an indication for some standards of analysis. The presumption seems to be in favor of the constitutionality of the law. First, there is not an absolute right. Also, "[t]he United States Constitution does not forbid a state to control the use of its own property for its own lawful nondiscriminatory purpose."[41] Perhaps, a reliance upon intelligent police administration is the only thing that can give substance to first amendment rights and the possiblity of misuse by officers should not be a sufficient reason to deny a state the power to perform its functions.[42] At least, it seems clear that the sheriff in *Adderly* was not under an obligation to protect the petitioners right to peaceably assemble or even make all reasonable efforts to protect them.[43] Thus, it appears that where the expressions are made by conduct rather than "pure speech," the first amendment right is not as "absolute." In fact, under Justice Black's apparent test, a presumption seems to lie in favor of the constitutionality of the regulation of conduct. Notice, in Justice Black's statement that the "Constitution does not forbid a State to control the use of its own property for its own nondiscriminatory purpose," discriminatory use of the property is tacitly approved. It is only the state's purpose which must be nondiscriminatory. This statement appears to open the door fairly wide for state regulation of demonstrations on public property. This type of analysis presumptively condemns expression or petitioning through conduct rather than "pure speech." This appears to be so, even though petitioning through more "acceptable" modes, i.e., using "pure speech" may be completely ineffective as a communication.[44] Even though

[39] *Id.*

[40] *Id.*

[41] 385 U. S. at 48.

[42] 340 U. S. at 275-276 [concurring opinion of Justice Frankfurter in Niemotko v. Maryland, 340 U. S. 268 (1950) and Kunz v. New York, 340 U. S. 290 (1950)].

[43] Compare Justice Black's dissent in *Feiner*, 340 U. S. at 326.

[44] This brings to mind the elementary general science discussion of whether there is sound if there is no one to hear.

a peaceful demonstration can be an exercise of basic constitutional rights "in their most pristine and classic form,"[45] the Court appears to have adopted the view that this exercise of basic rights must be "where people have a right to be for such purposes."[46] At least, in the case of mass demonstration in Washington, D.C., it would not appear consistent with our system to say that people do not have a right to exercise their right to peaceably assemble there. Perhaps then, in the Washington, D.C. situation, Justice Black's analysis in *Adderly* is not controlling. Clearly, Washington, D.C. is open to the public and its streets could be used.[47] However, in *Jeanette Rankin Brigade v. Chief of Capitol Police*,[48] the district court held that Congress had the power to make reasonable limitations on the exercise of freedom of speech and assembly. These basic rights were stated not to mean "that everyone with opinions to express may assemble and speak at any public place and at any time."[49] The restrictions in *Rankin* were reasonable because they insured "non-interference with the work of the legislature, the maintenance of free movement of tourists and visitors into and around the seat of government and protection of landscape."[50] In *Coppock v. Patterson*,[51] a Mississippi district court stated the apparent rationale of restricting the right to peaceably assemble and petition the government. It stated that "[g]ubernatorial action, legislative enactment, and judicial decision are not to turn on who at the moment commands the largest organized crowd or the meanest public horangue or the loudest speaking voice."[52] Obviously, there is merit to this statement. But, it seems that this rationale is not totally relevant to the right to communicate. Just because the legislative or judicial action should not depend upon the loudest demonstration does not mean that the right to demonstrate should therefore be restricted. The important element is the right to communicate one's views to the government. This is not claiming the right also encompasses the right to have the grievance settled. The government is obviously unable to grant every request of its citizenry. But this does not justify limiting the means by which the citizenry can communicate its grievances to the government. The threats or boisterous activity of a crowd should not dictate governmental decision-making but the representatives of the people should still listen to the crowds and assess their grievances. The distinguishing element is whether one emphasizes the character of the mass activity or the character of message that is

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[45] 372 U. S. at 235.

[46] Note 38, *supra.*

[47] Whether or not Pennsylvania Avenue!

[48] 278 F. Supp. 233 (D. D. C. 1968).

[49] *Id.* at 235.

[50] *Id.*

[51] 272 F. Supp. 16 (S. D. Miss. 1967).

[52] *Id.* at 19.

being communicated. Obviously, governmental action should not turn upon the size or nature of a crowd, but it should have the possibility of turning on the reason the crowd has formed. Fear of threatening crowds should not cause government representatives to turn a deaf ear to the pleas of its aggrieved citizenry. It would appear that a peaceful mass demonstration at the national capital would be exercising the first amendment right to communicate in its "pristine and classic form."

B. *Recent "Public Forum" Developments*

Amalgomated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.[53] presented the question of whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the owner's property rights. The court below had enjoined the picketing as a trespass and the petitioners claimed that the injunction decision violated their rights under the first and fourteenth amendments to the United States Constitution. Justice Marshall, for the majority, started "from the premise that peaceful picketing carried on in a location open generally to the public is. . . .protected by the First Amendment."[54] The particular limitation of public speech and assembly involved was that concerning location of the activity. The *Adderly* opinion had established that the location of the expressive conduct was a prime factor in evaluating the extent of protection under the first amendment.[55] If the location was publicly owned and was generally used by the public, the petitioners could not have been barred from exercising their first amendment rights.[56] Therefore, to transfer this privately owned shopping center into a permissible location for peaceable assembly, the Court used the "public function" test of *Marsh v. Alabama.*[57] The shopping center was deemed to function as a "business district."[58] The Court then noted the relevance of the "public use" of the particular location.

> Thus where property is not ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether.[59]

However, the *Adderly* decision did not furnish support for the decision in *Logan Plaza* "because it is clear that the public has virtually unre-

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[53] 391 U. S. 308 (1967).

[54] *Id.* at 313.

[55] Note 32 *supra.*

[56] *See* Lovell v. Griffin, 303 U. S. 444 (1938); Hague v. C.I.O., *supra* note 10; Schneider v. State, 308 U. S. 147 (1939); Jamison v. Texas, *supra* note 11.

[57] 326 U. S. 501 (1946).

[58] 391 U. S. at 319.

[59] *Id.* at 320.

stricted access to the property at issue here."[60] Thus, the Supreme Court seems to recognize the right to a public forum if the forum is located where the public has been allowed unrestricted access.[61]

Wolin v. Port of New York Authority[62] also involved using privately-owned, publicly-used, property to disseminate political ideas. Wolin was distributing political leaflets in the main concourse and other passageways of the Terminal Building operated by the Port of New York Authority. The Port Authority was apparently restraining this activity and Wolin sought a declaratory judgment that he be permitted to distribute the leaflets. A basic consideration as to the scope of Wolin's right to disseminate political ideas was a characterization of the particular location as either public or private. If it were private and used for private purposes, Wolin's right to use it as a public forum would "yield to the owner's right to be protected against trespass or invasion of privacy."[63] If the property was essentially dedicated to public use, the court reasoned that "the citizen's fundamental right to freely express his views in a public place" would be given presumptive validity. After referring to the right to communicate ideas as a "bulwark of our free, democratic society,"[64] and a "sacred right,"[65] the court indicated that the dedication of property to public use "in effect dedicates it to the exercise by the public of Constitutional rights, including the rights of free speech and assembly under the First Amendment."[66] These statements clearly denote a full recognition of the right to use public property as a public forum for the communication of political thoughts and for petitioning for a redress of grievances. However, the *Wolin* court refused to concede that this right was absolute. Again, the oft-used, limiting language of Justice Goldberg in *Cox v. Louisiana*,[67] was cited as indicating that certain regulatory restrictions were permissible.

"The rights of free speech and assembly . . . still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."[68]

The competing function of the Terminal was a free flow of traffic which was considered to be of lower priority under our constitutional scheme.[69] Thus, Wolin's conduct was protected. The *Wolin* court also considered *obiter dicta*, the possibility of restricting the constitutional right due to

[60] *Id.* at 321.

[61] Justice Black, along with Justices White and Harlan dissented.

[62] 268 F. Supp. 855 (1967).

[63] *Id.* at 859, citing Adderly v. Florida, *supra* note 32.

[64] 268 F. Supp. at 859.

[65] *Id.*

[66] *Id.* at 860.

[67] Note 26 *supra.*

[68] 379 U. S. at 554.

[69] 268 F. Supp. at 862.

probabilities of a provocation of violence or rioting. This portion of the opinion seems particularly applicable to the use of the mass demonstration as a mode of communicating a political viewpoint. The defendants argued that the controversial nature of the subject matter would lead to violence or rioting, particularly since the Terminal was frequented by members of the armed services. The court recognized the validity of the defendants concern but stated:

> [h]owever it is the very expression of views with respect to controversial political issues that most requires protection under the First and Fourteenth Amendments, however distasteful such views may be to certain segments of our society. The right of free public expression on political issues is too dearly prized to be curtailed without equally important public cause. Such suppression would be the first step toward ultimate stagnation of essential debate.[70]

It is noteworthy that the court cited *Edwards v. South Carolina*,[71] an exercise of peaceable assembly and petition of the government for a redress of grievances case, in its most "pristine and classic" form, and not *Terminiello v. Chicago*,[72] a pure speech case.[73] However, *Wolin* did involve the passing out of leaflets which may be considered more passive than a mass demonstration.

In *Tinker v. Des Moines Independent Community School Dist.*[74], the Supreme Court considered the right of high school students to wear black armbands during school time to publicize their objections to the hostilities in Vietnam. Surprisingly, Justice Fortas stated that the concern here was not "aggressive, disruptive action or even group demonstrations . . . [but] primary First Amendment rights akin to 'pure speech.' "[75] Although the Court held that the wearing of armbands was a protected expression, it seems somewhat awkward to call it "pure" speech. Justice Fortas in stating the issue assumes that this conduct is "akin to 'pure speech'." Even Justice Black, dissenting, does not expressly argue this point but appears to accept it only *arguendo* in order to concentrate on the "location" factor, i.e., in a public school.[76] On the location element, Justice Fortas stated that "free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots."[77] Although

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[70] *Id.* at 863.

[71] Note 23 *supra.*

[72] Note 16 *supra.*

[73] The value of the language in *Edwards* is evident since here it was cited for support in a "pure" speech case.

[74] 393 U. S. 503 (1969).

[75] *Id.* at 508.

[76] *Id.* at 516.

[77] *Id.* at 513.

this language is seen as upholding the constitutional right to a public forum,[78] it would appear that this statement is limited to "pure speech" or conduct "akin to 'pure speech'," and does not support the mode of mass demonstrations. Thus, the case seems to support only limited avenues of expression even though Justice Fortas is particularly "benevolent" in attacking the location limitation upon the free exercise of the right of expression. His original distinction reduces the mass demonstration to a secondary position under the first amendment while the wearing of black armbands is considered to be a primary first amendment right. In fact, Fortas seems to give mass demonstrations an even lower priority than "aggressive, disruptive action."[79] Perhaps, the best way to view *Tinker* is that it successfully cut away at the location limitation and thus apparently enlarged the scope of protected freedom of expression.

III. CRIMINAL SANCTIONS

A. *Washington, D.C. Riot Act*

It is recognizable that demonstrations, although not pure speech, are forms of self-expression. As mentioned, this particular form of self-expression often conflicts with various other state interests. When this conflict is presented to the judicial process, courts generally apply a "balancing of interests" test to settle the dispute. When the participants in a demonstration engage in violent conduct, the demonstration loses its first amendment protection.[80] The government has a definite interest in preventing physical damage to persons and property. Thus, the demonstration, even though recognized as an expression, does not receive the favored judicial respect of pure speech and can consequently be restricted by governmental provisions.[81] The reasonableness of these regulatory provisions is generally determined by a balancing of the competing interests of the demonstrators and the state. The cases that challenge these restrictive measures are usually concerned with either the provision itself or how it was applied to the facts. Where the provision itself is challenged the concepts of vagueness or indefiniteness, and overbreadth are the usual doctrinal routes.[82] The concept of vagueness refers to procedural due process requirements, i.e., proper notice and fair adjudication. Overbreadth refers to substantive due process where the issue is whether the regulatory measure substantively prohibits the exercise of constitutionally protected

[78] R. Hornung, *The First Amendment Right to A Public Forum*, 1969 DUKE L. J. 931, at 945.

[79] ". . . or *even* group demonstrations." [emphasis supplied] *see* note 75 *supra.*

[80] *See, e.g.* Feiner v. New York, *supra* note 19; Pritchard v. Davis, 326 F.2d 323 (8th Cir. 1964); Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773 (1967).

[81] *See* Cox v. Louisiana, *supra* note 26.

[82] *See generally* AMSTERDAM, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960); Collings, *Unconstitutional Uncertainty*, 40 CORNELL L. REV. 195 (1955).

freedoms.[83] Governmental provisions which restrict freedom of expression are obviously subject to these concepts. The particular concern is that such provisions may be worded so broadly that they discourage the exercise of the freedoms of expression and assembly because people fear they may be within the proscribed conduct.[84] The Supreme Court has indicated that statutory measures which seek to regulate first amendment rights should be narrowly drawn and strictly construed.[85] Some courts have listed relevant factors for determining whether a regulation meets these standards of clarity and narrowness. In *Landry v. Daley*,[86] the following factors are listed:[87] (1) whether a substantial interest worthy of protection is apparent from the language of the statute; (2) whether the terms of the regulation are susceptible to objective measurement by men of common intelligence;[88] (3) whether those charged with its enforcement are vested only with limited discretion; (4) whether its clarity is dependent upon manifold cross-reference to inter-related enactments or regulations.

The particular regulatory provision of concern here is the criminal offense of riot. In the context of a mass demonstration in this nation's capital, a discussion of what conduct would be considered criminally riotous seems appropriate. Necessarily, this consideration will also involve a constitutional evaluation of the riot laws in terms of vagueness and overbreadth. The offense of riot is firmly established as a limitation upon the rights of people to assemble and demonstrate.[89] This offense carries with it penal sanctions. The District of Columbia crime of riot reads as follows:

> (a) A riot in the District of Columbia is a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons.
> (b) Whoever willfully engages in a riot in the District of Columbia shall be punished by imprisonment for not more than one year or a fine of not more than $1,000, or both.[90]

In *United States v. Jeffries*,[91] the District Court for the District of Columbia had occasion to consider the constitutionality of this riot statute. The defendants there were charged with second-degree burglary, grand lar-

[83] NAACP v. Button, 371 U. S. 415 (1963).

[84] *See* Dombrowski v. Pfister, 380 U. S. 479 (1965); NAACP v. Button, *supra* note 83; Winters v. New York, 333 U. S. 507 (1948); Thornhill v. Alabama, 310 U. S. 88 (1940); Herndon v. Lowry, 301 U. S. 242 (1937).

[85] "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." 371 U. S. at 433.

[86] 280 F. Supp. 938 (N. D. Ill. 1968).

[87] *Id.* at 952.

[88] *See* Keyshian v. Board of Regents, 385 U. S. 589 (1967).

[89] R. PERKINS, CRIMINAL LAW 405 (1969).

[90] WASH. D. C. CODE ch. 22, §1122 (1967).

[91] 45 F. R. D. 110 (D.D.C. 1968).

ceny and willfully engaging in riot, following the April disorders in 1968. The defendants challenged the riot statute "as unduly vague and so lacking in criteria as to leave the public and the courts uncertain as to the nature of the conduct prohibited."[92] The act requires (1) a public disturbance; (2) an assemblage of five or more persons; (3) tumultuous and violent conduct or the threat thereof; (4) the creation of grave danger of damage or injury to property or persons. However, the D.C. court expressed the view that "the concept of vagueness requires regard for the overall thrust of the statute."[93] Thus, an evaluation of the definiteness of each word used in the statute is not the recommended approach. Without discussing the terminology of the statute or the specificity of the proscribed offense, the *Jeffries* court merely concluded that "[c]ertainly, this statute neither forbids nor requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as its meaning and differ in any substantial degree as to its application."[94] This conclusionary holding appears to lack an expressed analysis and thus requires further consideration. Perhaps the factors set down in *Landry v. Daley*,[95] would be helpful in determining the clarity and narrowness of the statute. Is there a substantial interest worthy of protection which is apparent from the language of the statute? The court in *Jeffries* stated that the statute was "cast in terms of 'riot' so that the words must be read in that context, ..."[96] Thus, the apparent substantial interest, as expressed by the District of Columbia District Court, is merely the prohibition of riots. Unfortunately, such a statement of the interest worthy of protection is not overly revealing as to the court's underlying reasoning. Thus, one must study the language of the statute to determine the interest to be protected. The words "tumultuous and violent conduct" and "danger of damage or injury to property" indicate a concern for deterring injuries to persons and property due to violent activities. This appears to be a substantial community interest worthy of protection.[97]

Are the terms of the statute susceptible to objective measurement by men of common intelligence? As mentioned, the court in *Jeffries* answered this factor affirmatively.[98] However, it appears that there may be conduct at the periphery of the proscribed activity which may be constitutionally protected. There is no requirement that the persons who are indicted for rioting also be those persons who were engaged in "tumultuous and violent" conduct. If several hundred people were to be con-

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92 *Id.* at 115.

93 *Id.*

94 *Id.* at 115-16, citing Conally v. General Construction Company, 269 U. S. 385 (1926).

95 Note 86 *supra.*

96 45 F. R. D. at 115.

97 *See* Feiner v. New York *supra* note 19.

98 45 F. R. D. at 115.

ducting a vigil or death march and several hundred others began a counter-demonstration throwing rocks and bottles, i.e., a "grave danger of damage or injury to property or persons," would those participating in the march be guilty of the offense of riot? Subsection (b) of the statute requires willful intent to "engage in a riot." Do the participants meet this requirement? Does the word assemblage only include those participating with a common intent? The *Jeffries* court does not deal with this question but it does state that the words "challenged in the statute have an accepted common law meaning."[99]

Interpolating the common law definition of riot into the Washington, D.C. code version should mean that those guilty of riot must be acting with a common intent to engage in riotous activity. This factor appears to increase the likelihood that those peaceably assembled, although their presence stirs others to riotous conduct, would not be within the proscribed conduct. The crucial issue, however, is assuming those who participated in the demonstration exhibited a common intent to cause unrest and dispute within the community, is that intent enough to make them participants in the riot. This is where it becomes necessary for the courts to distinguish the intent or purpose of the movement from the intent expressed in the particular demonstration. The purpose or intent of the peace movement is to stir people to action in hopes of effecting a change in governmental policy. The movement itself and its underlying purposes obviously stir up dispute in the community. However, the demonstration is intended to be a form of communication. It is expressing the view of the movement through attention-gaining conduct. The specific intent of the demonstrators is to express a view. Just because that view happens to create dispute and dissatisfaction in the community is no reason to condemn the form of expression as riotous or its participants as rioters. In fact, the Supreme Court has recognized that a "function of free speech under our system is to invite dispute."[100] The demonstration is a form of free expression and thus may legally invite dispute. Therefore, courts should not confuse the purpose of the over-all involvement, which indeed may, at times, seem to be evidence of riotous intent, with the intent to express a view in the form of demonstrations. The overt act of demon-

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[99] *Id.* A riot is a tumultuous disturbance of the peace by three or more persons acting together (a) in the commission of a crime by open force, or (b) in the execution of some enterprise, lawful or unlawful, in such a violent, turbulent and unauthorized manner as to create likelihood of public terror and alarm.

R. PERKINS, CRIMINAL LAW 405 (1969); also, Judge Stephens is quoted as including "persons assembled and acting with common intent." 38 Del. 322, 326, 192 A. 550, 551-2 (1937), cited in PERKINS, *supra*, n.29, at 405.

In an appendix to its opinion the *Jeffries* court did indicate that it was not necessary for the members of the assemblage to have acted pursuant to an agreement or plan made in advance. Also, the court noted, in a separate opinion, that the defendants, were liable to a joint trial on the charge of engaging in a riot. 45 F.R.D. 119 (1968); FED. R. CRIM. P. 8(b). 14.

[100] *See* Terminiello v. City of Chicago *supra* note 16, at 4.

strating is not done with riotous intent but merely with the intent to express a political opinion and it is that overt act which either is riotous or not. A literal reading of the riot statute makes it appear that if five or more persons are conducting a death march and two or three others "jump" them and tumultuous and violent conduct creates substantial dangers of damage, one is free to say that the march itself was a riot. However, subsection (b) requires "willful" engagement in a riot and obviously the marchers would not evidence the required intent. Although the "susceptibility of objective measurement by men of common intelligence" test obviously refers to those who intend to participate in a demonstration, the actual measurement of intent may be made by the policeman on the beat, whether or not objectively. As mentioned, the *Jeffries* court expressly stated that the D.C. riot act met the requirements of this test. Moreover, the question of intent will probably be left to the judicial process in its usual fashion.

The third factor was dealt with in part in discussing the preceding factor. Are those charged with enforcement of the act vested only with limited discretion? It is here that the "intent" distinctions previously discussed are important. If the policeman at the scene has complete discretion to assess the intent of the demonstrators then this test is not met. The statute itself does not mention police discretion. However, its wording may necessarily require the implementation of wide police latitude in enforcement. There must be a determination of whether there is a public disturbance involving five or more persons, whether there is tumultuous and violent conduct, and whether grave danger of personal or property damage is created. Initially, police discretion must be relied upon to interpret and apply these terms. There is ample room for flexibility in determining whether a "public disturbance" has occurred and also whether there is "tumultuous and violent conduct" likely to create danger to persons and property. Intent to riot must be established and perhaps this is the saving factor which keeps the statute from giving unlimited discretion to enforcement officers.

The fourth factor, mentioned in *Landry v. Daley*,[101] is whether its clarity is dependent upon cross-references to inter-related enactments or regulations.[102] The Washington, D.C. Code does not attempt to define "public disturbance" or "tumultuous and violent conduct." Thus, there is a certain lack of clarity concerning the scope of these terms. However, this lack of clarity is not based upon the necessity of cross-referencing in the Code. The lack of dependence upon various other sections of the Washington D.C. Code to determine the proscribed conduct is convincing evidence of compliance with this factor.

[101] Note 86 *supra.*

[102] It may require cross-referencing in case law and commentaries for common law definitions.

From the above analysis it appears that the Washington, D.C. riot statute probably would be upheld. It is indeed questionable whether present modes of attack upon statutory restrictions are adequate. The statute may be drawn narrowly and with clarity and nevertheless restrict protected first amendment rights. Perhaps, the courts should concentrate on the right to effectively disseminate political ideas as a fundamental right,[103] rather than proving a particular doctrinal mode of attacking a statute. Where a first amendment right is being subjected to curtailment under the guise of a criminal law, the "evil that may be collateral to the exercise of the right must be isolated and defined in a 'narrowly drawn' statute lest the power to control excesses of conduct be used to suppress the constitutional right itself. . . ."[104] The preservation of the constitutional right should be the acknowledged first premise in each analysis. By allowing peaceful petitioning to be suppressed, "we only increase the forces of frustration which the conditions of second-class citizenship are generating amongst us."[105]

B. *The Right to Travel Across State Lines.*

The right to use the national capital as a public forum to communicate grievances concerning governmental policy would be largely handicapped if people from outside the capital were unable to travel to Washington. The right to travel across state lines for many purposes has been generally taken for granted in the United States. Generally, the restrictions upon traveling across state lines have concerned commercial items,[106] immoral practices,[107] and have also been means of implementing standards of racial equality.[108] The concern here is with possible restrictions upon the traveling of people from their home state to chosen locations for the purpose of petitioning the government through mass demonstration. The right to travel from one state to another has been recognized as a constitutional right which "occupies a position fundamental to the concept of our Federal Union."[109] The right is not expressly mentioned in the Constitution. The specific constitutional provision, the penumbra of which is the source of this recognized right, has varied in the cases.[110]

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[103] For example, "[i]n general, overbreadth attacks are allowed for the exercise of a particular right of 'pure' speech as distinguished from conduct." Zwickler v. Koota, 389 U.S. 241, 296 (1967). "'[H]ard core' conduct applies only where the attack is for vagueness." Wright v. City of Montgomery, 282 F. Supp. 291 (M.D. Ala. 1968).

[104] Adderly v. Florida *supra* note 32 at 55 (dissenting opinion of Justice Douglas).

[105] *Id.* at 56.

[106] Wickard v. Filburn, 317 U.S. 111 (1942).

[107] United States v. Five Gambling Devices, 346 U.S. 441 (1953).

[108] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[109] United States v. Guest, 383 U. S. 745, 757 (1966).

[110] Edwards v. California, 314 U. S. 160 (1941) (privileges and immunities of the four-

The Supreme Court has indicated that provisions which tend to interfere with this "fundamental" right, should have their constitutionality "judged by the stricter standard of whether it promotes a compelling state interest." Thus, the right to travel from one's home state to the nation's capital in order to petition the government for a redress of grievances should be protected and any classifications which hinder that right must be compelling to withstand constitutional inquiry. In 1968 Congress passed Title I of the Civil Rights Act of 1968. Section 2101 concerns riots and people who "travel in interstate commerce . . . with intent to incite a riot."[111] This statutory provision obviously restricts the fundamental right to travel across state lines. Therefore, it represents a possible limitation upon the right to petition the government through the mass demonstration medium. The proscribed conduct is traveling "in interstate or foreign commerce." However, this conduct must be accompanied by an intent: (1) to incite a riot; or (2) to organize, promote, encourage, participate in, or carry on a riot; or (3) to commit any act of violence in furtherance of a riot; or (4) to aid or abet any person in inciting or participating in or carrying on a riot; *and* who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified. Section 2102 is the definitional section. Under section 2102(b) the term "incite to riot" is deemed not to include the "mere oral or written (1) advocacy of ideas or (2) expression of belief." It is noteworthy that this provision also appears to distinguish between "pure speech" and "speech-plus." Apparently, the term "incite to riot" may very well include the use of *conduct* to advocate ideas or express beliefs.

Under the doctrine of *United States v. Guest*[112] this federal statutory provision must represent "a compelling state interest" in order to withstand constitutional attack. Thus, it would appear that courts should require a specific showing of a clear violation before one's right to travel would be deemed criminal. The question of intent is again the key issue. As mentioned in regard to the Washington, D.C. riot statute, there may be a tendency to confuse the purpose of the act itself and the general purpose of the "movement" perpetrating the act. People may indeed believe and profess that our system of government should be radically changed through any means, but this fact should not make their interstate travel to peaceably petition the government a criminal act under federal law. The statute itself appears to provide an avenue for suppressing effective means of petitioning the government and thus should be suspect. It obviously restricts the right to travel—a fundamental right.

teenth amendment, also, the commerce clause); Kent v. Dulles, 357 U. S. 116, 125 (1958) (fifth amendment due process).

[111] 18 U. S. C. §§ 2101-2102, (1968).

[112] Note 109 *supra.*

In the case of mass demonstrations at the nation's capital, it is likely to restrict the right to peaceably assemble and petition the government for a redress of grievances—a first amendment right. Thus, in the context of the mass demonstration, sections 2101 and 2102 represent a double threat to rights that are fundamental to our system of government. How compelling can the required "compelling interest" be to outweigh these protected rights? Surely, this statute should be suspect and the burden of proving specific intent and clear violation should be made extremely difficult.

IV. CONCLUSION.

The concept of the political demonstration involves elements of free speech, free assembly, free petitioning of the government, free press, and free travel. It also represents the right of people to have a public forum for the dissemination of political views. This concept is particularly important for the protection of "minorities and to allow them to be heard as they are really the only ones who need the protection of the First Amendment. . . ."[113] The importance of being able to express political views and petition for redress of grievance cannot be overemphasized.

> Ultimately, a society which fails to respond effectively to its members, especially when the neglect of the needs of some of them has been accumulating and has been repeatedly called to its attention, will have little choice except between anarchy and tyranny. Demonstrations are a useful though potentially volatile warning mechanism. Muffling their sound will not prevent the explosion.[114]

The rich and the influential have easy access to mass communication media and have no problem in disseminating their ideas.[115] The Constitution should not be used to support the perpetuation of limiting access to effective petitioning. Contrarily, it should be the protector of those who are unable to match the powers of the rich and well-known.

> Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. . . . Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable. . . .[116]

Thus, as long as the location of the protest is public in nature and the demonstration itself is peaceful, the right to assemble and petition the government through this mode should receive nearly absolute protection. It has been suggested that the primary purpose of the first amendment is

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[113] Note, *Freedom of Speech and Assembly in Streets and Other Public Places*, 19 GEO. WASH. L. J. 637, 639 (1951).

[114] A. ETZIONI, DEMONSTRATION DEMOCRACY 66 (1968).

[115] Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, at 11.

[116] Adderly v. Florida, *supra* note 32 at 50 (dissenting opinion of Justice Douglas).

"to guarantee the maintenance of an effective system of free expression."[117] Our society is seeking certain values by protecting the right to freedom of expression. Some of these values are (1) assurance of individual self-fulfillment, (2) attainment of the truth, (3) securing participation by the members of society in social decision-making, and (4) maintaining a balance between stability and change in our society.[118] It is submitted that protecting the available means for petitioning the government is consistent with all of these values. The power of a person to realize his potentiality and to communicate his views are bound-up in gaining individual self-fulfillment. Allowing another viewpoint to be heard is an accepted means of attaining truth.[119] Obviously, hampering an available avenue of expression would be limiting the chances of attaining truth.

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution.[120]

The mass demonstration to petition the government is particularly in tune with the third desired value. It obviously secures wider participation by the members of society in social-decision-making. Protecting the demonstration as a free expression also is consistent with maintaining a balance between stability and change. The changes that are necessary for the continuation of a society must be known in order that rational action can be taken. The concept of free expression advocates the preservation of all modes of expression so that social man will not be ignorant of the needs of his society. The neglect of social needs may lead to radical change and destruction of stability. Thus, every effort should be made not to "muffle" the sounds of warnings by suppressing available means of communication. The right to communicate ideas through speech and protests "must carry with it the opportunity to win the attention of the public."[121]

A. Mark Segreti

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[117] T. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L. J. 877, 878 (1963).

[118] *Id.* at 878-879.

[119] This assumes the proposition that the more views expressed on a subject the more likely one is to gain the truth.

[120] Abrams v. United States, 250 U. S. 616, 630 (1919) (dissenting opinion of Justice Holmes).

[121] University Committee to End War In Vietnam v. Gunn, 289 F. Supp. 469, 477 (W. D. Tex. 1968).